Supreme Court, U.S.
FILED

No. 02157 1 FEB 13 2003

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In The

Supreme Court of the United States

DERRICK DWIGHT,

Petitioner,

versus

JAMES V. CROSBY, JR., Secretary, Florida Department of Corrections,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTION PRESENTED FOR REVIEW

I.

WHETHER THE TRIAL AND APPELLATE COURTS ERRED IN FINDING THAT THE DEFENDANT'S POST CONVICTION PETITION TO ATTACK HIS LIFE SENTENCE WAS TIME BARRED WHERE THE PETITIONER SHOWED THAT HE WAS ENTITLED TO A RULING ON THE MERITS OF HIS CASE SINCE THE ONE YEAR STATUTE OF LIMITATIONS FOR ACTION BROUGHT UNDER 28 U.S.C. §2254 WAS EQUITABLY TOLLED.

PARTIES TO THE PROCEEDING

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OPINIONS DELIVERED IN THIS CASE BY OTHER COURTS

The defendant's murder conviction was affirmed by the Florida First District Court of Appeals in *Dwight vs. State*, 677 So.2d 1363 (Fla. 1st DCA 1996); review denied, 684 So.2d 1350 (Fla. 1996).

The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the United States District Court for the Northern District of Florida denying the petitioner's petition filed under 28 U.S.C. §2254 in its opinion of September 18, 2002. See *Dwight vs. Moore*, 49 Fed. Appx. 228 (11th Cir. 2002). Rehearing of this decision was denied on November 15, 2002.

JURISDICTION OF THIS COURT

The petitioner seeks review of the affirmance on September 18, 2002 and the denial of the rehearing on November 15, 2002 in the United States Court of Appeals for the Eleventh Circuit. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1)and 28 U.S.C. §2253.

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The Fifth Amendment to the United States Constitution which states that "(n)o person shall . . . be deprived of life, liberty, or property without due process of law. . . ."

STATEMENT OF THE CASE INCLUDING THE BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND ARGUMENT

On September 22, 1993, a state grand jury in Tallahassee, Leon County, Florida returned an indictment charging the defendant with first degree murder and using a firearm in the commission of a felony.

The state conceded that Dwight had a mental defect and the mental evaluation process began. Dwight was found incompetent to proceed to trial on November 23, 1993 and placed in a mental health facility. In May 1995, the defendant was found competent to stand trial but insane at the time of the offense. There is no proof in the trial record that his public defender sought a competency hearing. Dwight's trial commenced on May 3, 1995. The trial was held without a jury after Dwight purportedly waived his right to a jury trial. The trial record is bare as to whether the waiver, which was done in writing, was executed knowingly and intelligently.

During the trial, three mental health witnesses testified on the defendant's behalf. They testified that in their expert opinions, Dwight was suffering from a mental illness at the time of the offense. They testified that Dwight suffered from paranoid schizophrenia which ". . . rendered him incapable of knowing the consequences of his actions." In its rebuttal case, the State called its mental health witness to the stand. The state's rebuttal witness testified that though he agreed that Dwight suffered from a mental illness at the time of the incident which impaired Dwight's ability to appreciate the "total picture of his actions," Dwight did understand that his

actions were wrong and did not meet the M'Naghten Rule test for insanity which is the Florida test for insanity. Based on his testimony, the trial court (sitting without a jury) concluded that the defendant's acts on the day of the shooting was not the result of a mental infirmity or defect rendering him unable to appreciate the nature of his actions.

The trial court's ruling was consistent with the testimony of the state's rebuttal witness and totally disregarded the testimony of the defendant's three mental health witnesses which included one treating and two evaluating mental health specialists. The trial judge found the defendant guilty as to both counts of the indictment. The defendant was sentenced to life in prison with a twenty-five (25) year minimum mandatory sentence.

The defendant's conviction as to the murder count was affirmed on direct appeal. See *Dwight vs. State*, 677 So.2d 1363 (Fla. 1st DCA 1996). The sentence on the firearm count was remanded for the imposition of a guideline sentence. Dwight's petition for discretionary review was denied by the Florida Supreme Court. 684 So.2d 1350 (Fla. 1996).

Under Florida Rule of Criminal Procedure 3.850, a timely motion for post conviction relief was timely filed on May 29, 1998. The state circuit court denied the motion and that decision was affirmed on appeal. See *Dwight vs. State*, 771 So.2d 1164 (Fla. 1st DCA 2000) The mandate was issued on that appeal on November 22, 2000.

Shortly thereafter, retained counsel filed a federal motion for post conviction relief pursuant to 28 U.S.C. §2254 in the United States District Court for the Northern District of Florida which was signed by Dwight on April

25, 2001. On November 15, 2001, United States Magistrate Judge William C. Sherrill Jr. entered a report and recommendation which recommended denying the petition as untimely.

In his report, the Magistrate Judge cited the 571 days that passed between the filing of the state court motion for post conviction relief and the November 1, 1996 denial of discretionary review. In addition, the Magistrate Judge wrote, had there been any portion of the one year federal period of limitations to be tolled, the filing of the §2254 motion would have tolled the time until the issuance of the mandate on the state court motion for post conviction relief on November 22, 2000. However, 194 additional days passed until the §2254 motion was properly filed in the district court on June 4, 2001.

While not contesting the aforementioned dates, Dwight's position was that the one time limit for filing a petition pursuant to 28 U.S.C. §2254 should have been equitably tolled based on the extraordinary circumstances surrounding Dwight's continued mental illness and delusions. Furthermore, Dwight's counsel stated that between 1995 and the summer of 2000, Dwight was transferred twenty (20) times from one correctional institution to another and immeasurable times within those institutions themselves thereby making Dwight unable to protect his legal rights.

The report and recommendation of United States Magistrate Judge William C. Sherrill Jr. were adopted by the district court. On January 8, 2002, United States District Judge Robert Hinkle denied Dwight's request for a certificate of appealability under 28 U.S.C. §2253(c)(1)(A). However, on March 26, 2002 United States Eleventh

Circuit Judge Joel F. Dubina granted Dwight's motion for a certificate of appealability since the claim satisfied the standard set forth in *Stack vs. McDaniel*, 529 U.S. 473 (2000) on the following issue:

> "Whether the district court correctly determined that the appellant's federal habeas corpus petition, filed pursuant to 28 U.S.C. §2254, was untimely under the one-year statute of limitations provision in the Antiterrorism and Effective Death Penalty Act of 1996."

The Court of Appeals declined to extend the certificate of appealability to any of the substantive issues raised in the §2254 petition due to an incomplete record.

After this issue was fully briefed by the parties, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of Dwight's §2254 petition as time barred on September 18, 2002. See *Dwight vs. Moore*, 49 Fed. Appx. 228 (11th Cir. 2002). Rehearing of this decision was denied on November 15, 2002.

REASONS FOR GRANTING THE PETITION

I.

WHETHER THE TRIAL COURT AND APPELLATE COURT ERRED IN FINDING THAT THE DEFENDANT'S POST CONVICTION PETITION TO ATTACK HIS LIFE SENTENCE WAS TIME BARRED WHERE THE PETITIONER SHOWED THAT HE WAS ENTITLED TO A RULING ON THE MERITS OF THE CASE SINCE THE ONE YEAR STATUTE OF LIMITATION FOR ACTION BROUGHT UNDER 28 U.S.C. §2254 WAS EQUITABLY TOLLED.

When the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA") was enacted, with it came limitations on the timing to file an action pursuant to 28 U.S.C. §2254. Under 28 U.S.C. §2244(d) such a petition may be filed within a one year period after the state court judgment becomes final to file federal habeas petition, subject to certain exceptions. Prior to the passing of the AEDPA, there was no such statute of limitations. See *Felder vs. Johnson*, 204 F.3d 168, 169-70 (5th Cir. 2000).

As a statute of limitation the otherwise stringent one year requirement cannot be utilized as a bar to federal jurisdiction. *Davis vs. Johnson*, 158 F.3d 806, 807 (5th Cir. 1998).

The courts must be cautious not to apply the statute of limitations too harshly. "Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar vs. Thomas*, 517 U.S. 314, 324 (1996).

Therefore, when the one year period is considered a statute of limitations, it could be and is susceptible to equitable tolling. *Felder vs. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000); *Delaney vs. Matesanz*, 264 F.3d 7, 14 (1st Cir. 2001). Several circuits have permitted equitable tolling of the AEDPA's statute of limitations when the petitioner can show that his habeas petition was delayed due to extreme hardship or unusual circumstances. See e.g., *United States vs. Marcello*, 212 F.3d 1005 (7th Cir. 2000); *Sandvik vs. United States*, 177 F.3d 1279 (11th Cir. 1999); *Davis vs. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998); *Miller vs. New Jersey State Department of Corrections*, 145 F.3d 616, 618 (3rd Cir. 1998)

Equitable tolling is appropriate when an extraordinary factor beyond the plaintiff's control prevents his filing on time. *Felder vs. Johnson*, 204 F.3d 168, 174 (5th Cir. 2000) (Garza, J. dissenting); *Coleman vs. Johnson*, 184 F.3d 398 (5th Cir. 1999); *Calderon vs. United States District Court*,163 F.3d 530, 541 (9th Cir. 1998)

However, circuits other than the Sixth Circuit have no bright line rules to determine whether equitable tolling is appropriate. In *Dunlap vs. United States*, 250 F.3d 1001, 1008, the court adopted equitable tolling principles under the AEDPA from *Andrews vs. Orr*, 851 F.2d 146 (6th Cir. 1988). This requires the court to consider the following factors when determining the appropriateness of equitably tolling a statute of limitations: (1) the petitioner's lack of notice of the filing requirements; (2) the petitioner's lack of constructive knowledge of the filing requirements; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing

his claim. *Graham-Humphreys vs. Memphis Brooks Museum of Art., Inc.*, 209 F.3d 552, 561 (6th Cir. 2000)

In the case *sub judice* both the district court and the Eleventh Circuit erred in not considering why and how the mental illness of Derrick Dwight in this case should have, at a minimum, triggered an evidentiary hearing to determine whether equitable tolling was appropriate. The Fifth Circuit has recognized that mental incompetency might support equitable tolling of a limitations period. See *Fisher vs. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999) quoting *Hood vs. Sears, Roebuck & Co.*, 168 F.3d 231, 232-33 (5th Cir. 1999).

"(I)n order for mental illness to constitute case and prejudice to excuse procedural default, there must be a conclusive showing that mental illness interfered with a petitioner's ability to appreciate his or her position and make rational decisions regarding his or her case. . . ." *Holt vs. Bowersox*, 191 F.3d 970, 974 (8th Cir. 1999).

Rooted within this theory that mental incompetence may support equitable tolling of a limitations period is that prisoners have a constitutional right to the access of the courts. The mental illness that Dwight was suffering during the critical one year period caused him actual harm by unconstitutionally preventing him from his right to access to the courts in order to attack his conviction or to challenge the conditions of his confinement. See *Lewis vs. Casey*, 518 U.S. 343, 355 (1996).

In the case at bar, the time frames involved under AEDPA are not in dispute; however, the facts underlying the need for the extraordinary tolling certainly are. There are conflicting time limitations for both state and federal post conviction relief. Under Florida's post conviction

rules, a timely petition for post conviction relief under Fla. R. Crim. P. 3.850 must be filed within two years, while the AEDPA one year limits run concurrently with that period.

Dwight was arrested for first degree murder in September, 1993. He has dealt with mental illness before and after his arrest. During his period of pretrial incompetency (which lasted for nearly eighteen months) Dwight was diagnosed with paranoid schizophrenia and a personality disorder. These were evaluations that were performed in 1993, 1994 and 1995. Although he was found barely competent to stand trial, all of the psychologists that testified both for the State and the defense at trial concluded that Dwight was mentally ill at the time of the murder and also suffering from varying degrees of paranoid schizophrenia at the time of the trial.

At the time of the sentencing, the trial court noted that Dwight should be placed in an institute near Miami and that the Florida Department of Corrections be made aware of Dwight's "ongoing mental illness."

An evidentiary hearing would have shown that Dwight has continued to suffer from ongoing delusions and fear of possible sexual attacks since his sentence on May 31, 1995. These delusions were evident by more than twenty transfers of Dwight within the Florida penal system from 1995 until the summer of 2000.

In calculating the one year period under AEDPA, the pertinent date to begin is November 1, 1996, when Dwight was denied discretionary review from the Florida Supreme Court. *Dwight vs. State*, 684 So.2d 1350 (Fla. 1996). Therefore, the period of time from November 1, 1996 until November 1, 1997 is crucial to the equitable tolling issue. Dwight put forward evidence to the district court that he

had commenced drafting his own state post conviction petition under Fla. R. Crim. P. 3.850, yet nothing was filed until after counsel was retained. Of great importance to the analysis in this case was the evidence of continuing severe mental illness on Dwight's part during the relevant time period.

Evidence presented to both the district and circuit courts would have established that the petitioner's mental instability was the reason for the failure to timely pursue his post conviction remedies. *See generally*, *Nara vs. Frank*, 264 F.3d 310 (3rd Cir. 2001); *Helton vs. Secretary for Dept. of Corrections*, 259 F.3d 1310 (11th Cir. 2001) ("Equitable tolling can be applied to prevent AEDPA's deadline when 'extraordinary circumstances' have worked to prevent any otherwise diligent petitioner from timely filing his petition.")

The ongoing nature of Dwight's mental illness when combined with the numerous transfers between institutions, cells and buildings made it impossible for Dwight and/or his counsel to timely protect his legal rights. Evidence submitted to the district court was that Dwight's limited focus was on fear of attacks and the constant belief that the inmates and the guards were conspiring against him. Clearly, Dwight's decision making process during the one year period was substantially impaired based on his severe mental illness, delusions, and constant transfers which made it impossible to access counsel.

Any burden that Dwight may have had to prove his mental illness during the relevant time frame was met. Dwight was able to demonstrate that the nature and extent of his mental illness should have led to the equitable tolling of limitations period under 28 U.S.C. §2254.

Time barring the petition of a mental ill petitioner where competence to waive the fundamental right to a jury trial and effective assistance of counsel are the cornerstone arguments as to whether he spends the rest of his life in prison reeks of fundamental unfairness.

Certiorari should be granted in this case so that a standard may be set by the Supreme Court regarding the equitable tolling of the statute of limitation in §2254 cases. Mentally ill inmates are the population of persons whose rights to access to the courts and availability of the Writ effects most. Failure to afford the remedy of equitable tolling to this population has the potential of robbing them of their final access to the courts and due process of law.

The delusions, fears and paranoid behavior of Dwight will manifest themselves for the rest of his life. Equitable tolling is a remedy and doctrine that permit the courts to extend a statute of limitations not for everyone but on a case by case basis to prevent inequity. *Warren vs. Garvin*, 219 F.3d 113 (2nd Cir. 2000)

The dismissal, the time barred petition, and its affirmance robbed the petitioner of the protections of habeas corpus entirely thereby injuring his important interest in human liberty and due process of law. Denial of the protections of a hearing on the merits of Derrick Dwight's §2254 petition due to his ongoing mental illness will doom him to serve a life sentence without having had equal protection of the law and fundamental fairness guaranteed him by the Constitution.

CONCLUSION

WHEREFORE, the Petitioner respectfully requests that this Court, for all of the foregoing reasons, should grant this petition for certiorari and enter a judgment reversing the Court of Appeals finding that the petition filed pursuant to 28 U.S.C. §2254 was time barred and directing the District Court to consider that petition on its merits.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-17093
Non-Argument Calendar

D.C. Docket No. 01-00156-CV-4-RH

DERRICK DWIGHT,

Petitioner-Appellant,

versus

MICHAEL MOORE,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(Filed September 18, 2002)

Before DUBINA, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

Derrick Dwight, a Florida prisoner serving a life sentence for first degree murder, appeals from the denial of his petition for writ of habeas corpus, which was brought pursuant to 28 U.S.C. § 2254. Because Dwight filed his § 2254 petition on June 7, 2001, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996), governs this appeal. On appeal, Dwight asserts that the district court erred in not finding that the one-year limitations period

for filing his § 2254 petition under the AEDPA should be equitably tolled based on the fact that his mental illness and transfers within the department of corrections ("DOC") rendered him unable to protect his legal rights. Dwight also asserts that (1) the state failed to show that tolling would prejudice it and (2) the denial of his § 2254 petition was an unconstitutional suspension of the writ of habeas corpus.[1]

We review *de novo* a district court's determination that a § 2254 petition is time-barred. *Jackson v. Secretary for Dep't of Corrections*, 292 F.3d 1347, 1348 (11th Cir. 2002). We also review a district court's legal decisions on equitable tolling *de novo. Helton v. Secretary of Dep't of Corrections*, 259 F.3d 1310, 1312 (11th Cir 2001), *cert. denied,* 122 S. Ct. 1965 (2002). The district court's determinations of the relevant facts, however, will be reversed only if clearly erroneous. *Dorsey v. Chapman*, 262 F.3d 1181, 1185 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 1567 (2002).

The AEDPA imposes a one-year statute of limitations on all habeas corpus petitions. 28 U.S.C. § 2244(d)(1). This one-year limitations period is measured from the latest of the date on which (1) the conviction became final by conclusion of direct review or the expiration of the time for seeking such review; (2) the impediment to making a

[1] While Dwight cites to *Horace v. Wainwright,* 781 F.2d 1558 (11th Cir. 1986), in support of his argument that the state had the burden of showing that it would be prejudiced by the delay in filing for federal habeas corpus relief, *Horace* was decided before the AEDPA went into effect and instead addressed the applicability of the doctrine of laches. *Id.* at 1565.

motion created by governmental action in violation of the law was removed, if the governmental action prevented the filing of the petition; (3) the Supreme Court initially recognized the right asserted, if that right has been newly recognized and made retroactively applicable to cases on collateral review; or (4) the facts supporting the claim could have been discovered through due diligence. *Id.*

Even if a petition is filed outside of this one-year period, equitable tolling can be applied when "extraordinary circumstances" have worked to prevent an otherwise diligent petitioner from timely filing his petition. *Helton,* 259 F.3d at 1312. "Equitable tolling is an extraordinary remedy which is typically applied sparingly." *Stead v. Head,* 219 F.3d 1298, 1300 (11th Cir. 2000). However, it is "appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. United States,* 177 F.3d 1269, 1271 (11th Cir. 1999) (denying equitable tolling based on the inefficiencies of the U.S. Postal Service); *see also Akins v. Untied States,* 204 F.3d 1086, 1089-90 (11th Cir.) (denying equitable tolling based on the petitioner's placement in "lock down" and misplaced legal papers), *cert. denied,* 531 U.S. 971 (2000).

The burden of establishing entitlement to this extraordinary remedy rests with the petitioner. *Helton,* 259 F.3d at 1313-14. Dwight does not contest the finding that, even tolling the period while his Rule 3.850 motion was properly filed, from May 26, 1998 through November 22, 2000, his § 2254 petition, filed on June 7, 2001, was not filed within one year of when the Florida Supreme Court denied him discretionary review of his direct appeal, November 1, 1996. Rather, he argues that the district court erred in not finding that the statute of limitations for

filing his § 2254 petition under the AEDPA should be equitably tolled based on the fact that his mental illness and transfers within the prison system rendered him unable to protect his legal rights and communicate with his counsel.

We have not previously addressed whether evidence that a petitioner's ongoing mental illness and/or resulting transfers within the prison system prevented him from timely filing a § 2254 petition constitutes a basis for equitable tolling of the AEDPA's statute of limitations. Nevertheless, Dwight failed to meet his burden of showing that he suffered from a mental illness during the relevant time period and that it affected his ability to timely file his § 2254 petition. As such, we do not reach the issue of whether the illness could constitute an extraordinary circumstance. *See United States v. Nyhuis*, 211 F.3d 1340, 1344 n. 4 (11th Cir. 2000) (holding that the issuance of a COA does not guarantee consideration of a movant's underlying constitutional claims and that we should not pass upon a constitutional question if some other ground upon which the case may be disposed is also present), *cert. denied*, 531 U.S. 1131 (2001).

Because Dwight did not meet his burden of presenting sufficient evidence to show that he untimely filed his § 2254 petition because of extraordinary circumstances, the district court did not err in finding that equitable tolling was inapplicable and that his petition was time-barred.

In addition, Dwight's reliance on our opinion in *Wyzykowski v. Department of Corrections*, 226 F.3d 1213 (11th Cir. 2000), to assert a violation of the suspension clause is misplaced. The Suspension Clause provides that

"[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." U.S. Const. art. I, § 9, cl.2. Despite this restriction, however, the Supreme Court has held that judgments about the proper scope of the writ "are normally for Congress to make." *Felker v. Turpin*, 518 U.S. 651, 664, 116 S. Ct. 2333, 2340, 135 L. Ed. 2d 827 (1996) (internal citations omitted). In *Wyzykowski*, we concluded that because, "as a general matter, the § 2244(d) limitation period does not render the collateral relief ineffective or inadequate to test the legality of detention," § 2244(d) does not *per se* constitute an unconstitutional suspension of the writ. *Wyzykowski*, 226 F.3d at 1217. Furthermore, the availability of equitable tolling ensures that the limitation is constitutionally applied. *Tinker v. Moore*, 255 F.3d 1331, 1334 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 1101 (2002).

Accordingly, we affirm the district court's denial of Dwight's § 2254 petition as time-barred.

AFFIRMED.

677 So.2d 1363

District Court of Appeal [sic] of Florida,
First District.

Derrick DWIGHT, Appellant,
v.
STATE of Florida, Appellees.

No. 95-2099.

Aug. 14, 1996.

Nancy A. Daniels, Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Daniel A. David, Assistant Attorney General, Tallahassee, for Appellee.

LAWRENCE, Judge.

We have for review the first-degree murder conviction and sentence of Derrick Dwight (Dwight), imposed after a bench trial. Dwight argues that the evidence of his sanity was competent but not substantial, and that his departure sentence for the use of a firearm in the commission of a felony must be reversed for failure to give reasons.[1] We affirm Dwight's convictions and his life sentence for murder, including a twenty-five year mandatory minimum term; we reverse his fifteen-year concurrent sentence for

[1] Dwight concedes that his argument that he cannot be convicted of both first-degree murder and the use of a firearm in the commission of a felony, based on a single incident, is foreclosed by *State v. Martin*, 602 So.2d 1263 (Fla.1992), *cert. denied*, 507 U.S. 976, 113 S.Ct. 1426, 122 L.Ed.2d 794 (1993).

the use of a firearm, and remand for imposition of a guidelines sentence.

Dwight thrice shotgunned a friend on August 20, 1993, in Tallahassee. Dwight, suffering from mental illness, erroneously believed that his friend, along with another man, had raped him. Dwight remained at Florida State Hospital until July 27, 1994.

The State's expert testified at the May 1995 trial that Dwight was legally sane at the time of the killing. The Florida Supreme Court tells us:

> [A]n appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is *substantial, competent evidence* to support the verdict and judgment.

Tibbs v. State, 397 So.2d 1120, 1123 (Fla.1981) (footnote omitted) (emphasis added), *aff'd,* 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The Florida Supreme Court also tells us:

> The legal test of insanity in Florida, for criminal purposes, has long been the so-called "M'Naghten Rule." Under the M'Naghten Rule an accused is not criminally responsible if, at the time of the alleged crime, the defendant was by reason of mental infirmity, disease, or defect unable to understand the nature and quality of his act or its consequences or was incapable of distinguishing right from wrong.
>
> In light of the requirements of the M'Naghten Rule any expert testimony . . . to be relevant,

> must concern whether [the defendant] (1) was incapable of *distinguishing right from wrong* (2) as a result of a mental infirmity, disease, or defect. Both of these aspects of the insanity defense must be addressed. Expert testimony that a defendant suffered from a mental infirmity, disease, or defect without concluding that, as a result, the defendant could not distinguish right from wrong is irrelevant.

Hall v. State, 568 So.2d 882, 885 (Fla.1990) (emphasis added) (citations and footnote omitted). The trial judge's finding that Dwight was capable of distinguishing right from wrong at the time of the murder is supported by substantial, competent evidence.

The evidence includes the following. Psychologist McClaren opined "there's no doubt in my mind that [Dwight] knew what he was doing in the sense of shooting a human being to death with a shotgun, a pump shotgun that had to be manually operated." McClaren further opined "[Dwight] did have the capacity to understand the wrongfulness"; "he clearly knew that to kill the victim was wrong"; "[h]e told me that had a police officer been there at the time, he would not have shot [the victim]." McClaren moreover testified on cross-examination:

> Q: [A]re you saying today that [Dwight] did not suffer from paranoid schizophrenia to the extent that he could not distinguish right from wrong?
>
> A: No, I'm saying that he was most likely developing paranoid schizophrenia. I think that *he could distinguish right from wrong.*
>
> What I'm saying is that the debate may be about, at least in my mind, may be the degree of the appreciation of the consequences. If the nature of

> the consequences mean I'm taking a pump shotgun to a person that I think has done me wrong, then I think he understood the consequences. If it is more global than that, that I am taking a pump shotgun to a human being who has done me no wrong and my thinking is all messed up and I understand that, I don't think he knew that.
>
> Q: Okay. So, I think we all agree that he understood the immediate consequences of pointing a gun and pulling the trigger?
>
> A: And, in my view at least, *the wrongfulness of this.*

(Emphasis added.)

Dwight nevertheless relies on three defense experts who unequivocally testified contrary to McClaren, while McClaren "swayed and fluttered." Psychiatrist Rucker testified: "There was no question in my mind that the day [Dwight] committed this tragedy he was unable to recognize what he was doing was wrong." Licensed clinical psychologist Brown opined that Dwight "did not realize that what he was doing was wrong." Psychiatrist Lartigue opined that Dwight "was insane at the time of [the murder]." The test however is not whether we would decide the sanity question differently sitting as the trier of fact, but whether competent substantial evidence supports the conclusion of the trier of fact. *Tibbs.* McClaren's testimony provides that evidence. We therefore must affirm Dwight's convictions.

Dwight also argues that his sentence for use of a firearm in the commission of a felony must be reversed. We agree. The trial judge sentenced Dwight to a departure

sentence (fifteen years) for the use of a firearm in the commission of a felony, but gave no written reason for the departure. We therefore remand for the imposition of a guidelines sentence. *Pope v. State,* 561 So.2d 554 (Fla.1990).

We accordingly affirm Dwight's convictions, affirm his sentence for first-degree murder, reverse his sentence for the use of a firearm, and remand for the imposition of a guidelines sentence for the latter crime.

MINER and ALLEN, JJ., concur.

684 So.2d 1350

(The decision of the Supreme Court of Florida is referenced inthe Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.')

Supreme Court of Florida.

Derrick Dwight

v.

State

NO. 88,959

Nov 01, 1996

Appeal From: 1st DCA, 677 So.2d 1363

Dispostion: Rev. den.

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA.

STATE OF FLORIDA,

vs.

CASE NO. 93-2418

DERRICK DWIGHT,

Defendant. /

ORDER DENYING AMENDED MOTION
FOR POSTCONVICTION RELIEF

THIS CAUSE came before the Court upon the Defendant's Amended Motion for Postconviction Relief filed on June 1, 1998, pursuant to Rule 850, Florida Rules of Criminal Procedure. The Court having considered the State's response, having reviewed the court file, and otherwise being fully advised in the premises finds the following.

The Defendant was tried and found guilty by the court to counts of first degree murder and use of a firearm in the commission of a felony. On May 31, 1995, the Court sentenced the Defendant to life imprisonment on the count of first degree murder and a fifteen years imprisonment on the count of use of a firearm in the commission of a felony. In accordance with the provisions of section 775.082(1), Florida Statutes, the court ordered that the Defendant serve no less than twenty-five years in prison for his capital offense.

In his motion, the Defendant alleges three grounds for relief. First, the Defendant claims that the record is devoid of a written order finding him competent to stand trial,

pursuant to Rule 3,212(c)(7), Florida Rules of Criminal Procedure, after he had been previously adjudicated incompetent. Although the Court made an oral finding that the Defendant was competent to stand trial, (See attached Exhibit A), the court's failure to file a written order does not require that the Defendant's conviction be vacated. *See Corbitt v. State*, 744 So. 2d 1130 (Fla. 2d DCA 1999). Thus, the Defendant is not entitled to relief under Rule 3.850, Florida Rules of Criminal Procedure. Furthermore, this is a claim that should have been raised on direct appeal. As such, the Defendant's claim fails.

Second, the Defendant alleges that the Defendant's conviction should be vacated because the Defendant's waiver of jury trial had no execution date. Under Rule 3.260, Florida Rules of Criminal Procedure, there is no requirement that, in order for the waiver of jury trial to be valid, it must be dated. Also, the Defendant's allegation that the Court did not make an inquiry into the intelligence and voluntariness of his waiver of jury trial is an issue that should have been raised on direct appeal. *See Christie v. State*, 737 So. 2d 1157, 1158 (Fla. 1st DCA 1999). Therefore, the Defendant's claims fail.

Third, the Defendant alleges that counsel was ineffective for: 1) filing an undated waiver of jury trial which was executed by the Defendant, and 2) that counsel misapprehended that the Defendant was proceeding on a second degree murder charge rather than a first degree murder charge. In reviewing these claims, the Defendant neither alleges nor demonstrates any prejudice to the outcome of the proceedings and, as such, these claims are legally insufficient for consideration. *See Strickland v. Washington*, 466 U.S. 668 (1984).

ORDERED AND ADJUDGED that the Defendant's Amended Motion for Postconviction Relief is hereby DENIED. The Defendant has 30 days from the date of this order in which to file an appeal.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 17 day of February, 2000.

/s/ Janet E. Ferris
JANET E. FERRIS
Circuit Judge

copies provided to:

David H. Freeman
11900 Biscayne Boulevard
Suite 616 – Biscayne Centre
North Miami, FL 33181
Attorney for Defendant

State Attorney's Office
Leon County Courthouse

771 So.2d 1164

(The decision of the Florida District Court of Appeal is referenced in the Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.')

District Court of Appeal of Florida,
First District

Derrick Dwight
v.
State

NO. 1D00-1210

October 27, 2000

Appeal From: Cir.Ct. (Leon)

Disposition: Aff.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

DERRICK DWIGHT,

Petitioner,

vs. **CASE NO. 4:01cv156-RH**

MICHAEL W. MOORE,

Respondent.

_____/

REPORT AND RECOMMENDATION

(Filed Nov. 15, 2001)

Through counsel, Petitioner Derrick Dwight filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Docs. 6 (memorandum), 7 (appendix), and 9 (form petition). A show cause order was entered.

Pending is Respondent's answer, seeking dismissal of the petition as time barred. Doc. 13. References to exhibits are to those attached to the answer. Petitioner filed a response with appendix. Doc. 14. The appendix is identical to that submitted as doc. 7 except that it also contains a copy of the judgment. References to the appendix are to the appendix supplied by Petitioner with docs. 7 and 14.

§ 2254 Limitations Period

Under the Antiterrorism and Effective [sic] Penalty Act (AEDPA), effective April 24, 1996, there is a one year time limit for filing a § 2254 petition. § 2244(d)(1). With some exceptions which do not apply here, a § 2254 petition must be filed within one year from the conclusion of direct

review or expiration of the time for seeking such review. § 2244(d)(1)(A).[1] "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward" the one year period, however. § 2254(d)(2). The time period may also be equitably tolled, on a showing of "extraordinary circumstances that are both beyond [petitioner's] control and unavoidable even with diligence." *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) (citations omitted); *Akins v. United States*, 204 F.3d 1086, 1089 (11th Cir. 2000) (quoting *Sandvik*). Equitable tolling is discussed further in the court's legal analysis, *infra*.

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[1] Section 2244(d)(1) provides that the period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Procedural History

Petitioner challenges his 1995 conviction out of the Second Judicial Circuit, case number 93-2413-AF. According to the opinion on his direct appeal,

> Dwight thrice shotgunned a friend on August 20, 1993, in Tallahassee. Dwight, suffering from mental illness, erroneously believed that his friend, along with another man, had raped him. Dwight remained at Florida State Hospital until July 27, 1994.

Dwight v. State, 677 So. 2d 1363, 1364 (Fla. 1st DCA 1996). He was at the Florida State Hospital due to determinations of incompetency, but later found competent to proceed. App. pp. 1-25.

After a bench trial, Petitioner was convicted of first degree murder and use of a firearm in the commission of a felony. *Id.*, pp. 44-48; 677 So. 2d 1364. Judgment was entered on May 31, 1995. App. p. 48. Petitioner's life sentence with 25 year minimum mandatory was affirmed on appeal, but the firearm sentence reversed and remanded for imposition of a guidelines sentence. 677 So. 2d at 1365-66. The mandate issued on August 30, 1996, and Petitioner's notice to invoke discretionary review was denied by the Florida Supreme Court on November 1, 1996. Exs. A-C.

Represented by David Freedman, the same counsel representing him in this § 2254 proceeding, Petitioner filed an amended Fla.R.Crim.P. 3.850 motion on or about May 26 or 29, 1998 (respectively, the date it was signed by Petitioner and the date counsel mailed it to the court). Ex. D. The motion was denied (a copy of the order is not in the

file), and the mandate on appeal was issued on November 22, 2000. Ex. E (copy of the mandate).

This § 2254 petition was signed by Petitioner on April 25, 2001. Doc. 9, p. 7. The petition was initially rejected because counsel was not admitted to practice in this court. Doc. 1. The petition was then filed about six weeks later after counsel sought and was granted leave to proceed pro hac vice. Docs. 6-9. As noted in the show cause order (doc. 10), the petition with memorandum (filed after leave to proceed pro hac vice was granted) bears a certificate of service dated June 4, 2001. Doc. 6.

Arguments by the Parties

Respondent asserts that the petition is untimely. Starting the period from the denial of discretionary review by the Florida Supreme Court on November 1, 1996, Respondent contends that 571 days passed before Petitioner filed his Rule 3.850 motion, on May 26, 1998. Had there been any portion left of the one year federal period of limitations to be tolled, the filing of this motion would have tolled the time until issuance of the mandate on November 22, 2000. But then another 194 days elapsed before the petition was filed in this court on June 4, 2001. By this calculation, this petition is untimely.

Petitioner does not challenge the dates or calculations made by Respondent, but asserts that he is entitled to equitable tolling of the limitations period. Doc. 6, pp. 16-18; doc. 14, pp. 2-5. The court accepts the dates advanced by Respondent for purposes of this report and

recommendation because, if equitable tolling does not apply, other possible dates do not make the petition timely.[2]

To support entitlement to equitable tolling, Petitioner asserts in his petition:

> Since his incarceration [in 1995[3]], Mr. Dwight has continued to suffer from ongoing delusions and fear of possible sexual attacks and conspiracy. Said delusions and fears are evident by the fact that Mr. Dwight was transferred from one correctional institution to other correctional institutions

---

[2] The date of the mandate or the date on which the time expired for filing a petition for writ of certiorari are other possible dates on which the conviction arguably became final for purposes of the one year period. *Compare*, *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001) (considering, without discussion, that the conviction became final on the date of the mandate) and *Coates v. Byrde*, 211 F.3d 1225, 1226 (11th Cir. 2000), *cert. denied*, 121 S.Ct. 1129 (2001) (the language of § 2244(d)(a)(A) includes the time for seeking certiorari, but § 2244(d)(2) does not). The § 2254 petition probably relates back to the date on which it was originally submitted to this court for filing, though counsel had not yet been admitted to practice. *Mederos v. United States*, 218 F.3d 1252, 1254-55 (11th Cir. 2000) (where first § 2255 was technically insufficient for lack of signature, the second should have been considered an amended motion which related back to the first). It would not be considered filed on the date Petitioner signed it, however, as counsel does not get the benefit of the prison "mailbox rule." *See Sandvik v. United States*, 177 F.3d 1269, 1272 (11th Cir. 1999) (that § 2255 motion was late because counsel mailed it less than a week before it was due was not a basis for equitable tolling). Respondent gave Petition the benefit of the mailbox rule in considering the 3,850 motion filed on the date that he signed it, though it was served by counsel a few days later. But this sort of fine tuning is not needed. The central question is whether Petition is entitled to equitable tolling.

[3] Petitioner states that he was incarcerated following his sentencing on May 31, 1991, but the date of the sentence was May 31, 1995. Compare doc. 14, p. 2 and App. p. 48.

> in excess of twenty times from 1995 through the summer of 2000. (A. 26-43).
>
> * * *
>
> Because of Mr. Dwight's ongoing mental illness and the constant transfers of Mr. Dwight from one institution to another or from one cell block to another, Mr. Dwight was unable to protect his legal rights. It was impossible for counsel to contact Mr. Dwight without having to spend considerable time just trying to locate him. And once counsel located his client, it was almost impossible to discuss the continuation of the appeal process and the time limitations when Mr. Dwight's limited focus was on the fear of attack and the constant belief that the inmates and guards were all conspiring against him.

Doc. 6, pp. 16-17, ¶¶ 13, 18. In his traverse, Petitioner argues that his "mental illness and the constant transfers of Mr. Dwight from one institution to another or from one cell block to another, made it difficult, if not impossible for Mr. Dwight and his attorney to protect his legal rights." Doc. 14, p. 3. The court reads this, therefore, as a claim that equitable tolling should be found because Petitioner's attorney was unable to prepare the Rule 3.850 motion and this habeas petition due to Petitioner's mental illness and location within the Department of Corrections.

In addition to the transfer history cited, the appendix includes competency evaluations of Petitioner from 1993, 1994, and 1995, and grievances submitted by Petitioner in August and September of 1998. App. pp. 1-25, 27-31. The inmate transfer history reflects that Petitioner was at the North Florida Reception Center from June 15, 1995, to June 27, 1996. App. p. 26. He arrived at Everglades

Correctional Institution (Everglades) on June 28, 1996, and remained there until January 21, 2000, except for two brief periods (August 7-9, 1997, and April 1-16, 1999) when he was sent to the South Florida Reception Center. *Id.*

Everglades Correctional Institution is at 1601 S.W. 187th Avenue, in Miami. App. pp. 32-37. Plaintiff's attorney has his office in North Miami. *Id.* Both are in Dade County, Florida. The South Florida Reception Center is also nearby. Subsequent transfers (to Columbia Correctional Institution on January 24, 2000, and eventually to Dade Correctional Institution on July 14, 2000) were prompted by requests made through counsel. App. pp. 32-43 (correspondence between counsel and wardens). The letters written by Department of Corrections employees at Everglades Correctional Institution to counsel in North Miami contained telephone contact numbers for any further questions. App. pp. 33, 35, 38, 39.

The psychological reports all predate the finding of competency and Petitioner's trial.[4] Petitioner was considered competent to proceed to trial in 1994 and 1995. App. 8-25. One report noted that while he previously was not competent to proceed to trial, "paranoid ideation remains, although much of it is non-court-related," and, "[m]ore importantly . . . is not delusional but rather, by self-report, part of his cultural experience." App. p. 12 (evaluation of July 7, 1994). It was concluded that Petitioner had "a

[4] There is one report which is not dated, but was pursuant to an August 11, 1994, court order for psychological evaluation, and is based on an interview with Petitioner on August 17, 1994. App. pp. 19-22.

factual rational, and somewhat sophisticated knowledge of the nature and object of the proceedings pending against him. He displayed an ability to work meaningfully with defense counsel, and to establish a viable defense." *Id.*, 13. A later report concluded that Petitioner had "the capacity to participate in his defense. He is responsible for his behavior and the consequences of his actions." App. p. 22 (report following August 17, 1994, interview). In 1995, he was found improved (less nervous and delusional) due to medication, and competent to proceed as he "understands the adversarial nature of the court proceedings, the seriousness of the charges against him, and the possible consequences if found guilty." App. p. 24 (report of January 12, 1995).

The most recent evidence of Petitioner's mental state are the two grievances submitted. In the grievance of August 5, 1998, Petitioner complained of harassment by homosexual inmates, providing logical details as to how this was occurring. He said that he thought the officers had discussed this with each other and were also harassing him, and he described their actions. App. pp. 28-30. He said that although he was insane at the time of his offense, "I would like to assure you that these problems that I'm suffering from now are very much a reality, and they aren't delusional dreams!!" App. p. 30. Petitioner thought that the harassment was due to facts surrounding his offense and the fact that he was once a correctional officer. App. p. 31. Petitioner asked to be transferred "somewhere in this area due to the fact that my family and lawyer are here in Miami." *Id.*

The grievance was denied as it addressed more than one issue or complaint. App. p. 28. Petitioner appealed this decision in his grievance of September 1, 1998, claiming

that only one issue had been presented and everything else was given to support his claim that the grievance was of a sensitive nature. App. p. 27. The appeal was returned without action. *Id.*

Legal Analysis

"As a discretionary doctrine that turns on the facts and circumstances of a particular case, equitable tolling does not lend itself to bright line rules. . . ." *Fisher v. Johnson*, 174 F.3d 710, 713 and n. 9 (5th Cir. 1999), *cert. denied*, 121 S.Ct. 1124 (2001) (noting that equitable tolling can be denied as a matter of law or in the court's discretion). The one year commenced on November 1, 1996, and absent any tolling activity it expired no later than November 3, 1997 (November 1, 1997, was a Saturday). Petitioner has shown no extraordinary circumstances that were beyond his control and unavoidable even with diligence for the relevant period. He has shown that he was found to be incompetent prior to 1994 but considered competent after that. The allegations of incompetency, significantly pre-dating commencement or expiration of the relevant period, are insufficient. *Fisher v. Gibson*, 262 F.3d 1135, 1145 (10th Cir. 2001) (petitioner's "mere allegations of incompetency at the time of his 1992 and 1994 pleas, all of which significantly pre-date this Circuit's April 24, 1997 grace period for pre-AEDPA convictions, do not suffice."). The alleged mental incompetency must have affected Petitioner's ability to timely file his Rule 3.850 motion, and a brief or previous period of incompetency does not support application of equitable tolling. *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001) ("mental incompetence is not a *per se* reason to toll a statute of limitations. Rather, the alleged mental incompetence must somehow

have affected the petitioner's ability to file a timely habeas petition.") (citations omitted); *Fisher v. Johnson*, 174 F.3d at 715 (noting that while mental incompetency might support equitable tolling, a brief period of incapacity does not necessarily warrant tolling).

There has been no credible showing that repeated transfers prevented Petitioner from filing, either. The general allegations that it was "difficult" and took "considerable time" for counsel to locate Petitioner are unsupported by specifics and contradicted by the record. Petitioner arrived at Everglades Correctional Institution before the limitations period commenced and remained there until long after the period expired, with only three days interruption during the relevant period and less than twenty days for the entire period. Petitioner was in the same county as his attorney during all of the relevant time, and there is no reason Petitioner's attorney could not have visited with him in person. The letters in the file, though written after the period had expired, reflect prompt responses from the institution to counsel, and provide specific telephone numbers. Transfer of a prisoner within an institution is not a particularly extraordinary or unusual circumstance. Moreover, that it may have taken some time to contact Petitioner is not a circumstance which is unavoidable by diligence. *See Sandvik*, 177 F.3d at 1272 (though mail delay was beyond counsel's control, the problem could have been avoided with diligence). "Equitable tolling can be applied . . . when 'extraordinary circumstances' have worked to prevent an *otherwise diligent petitioner* from timely filing his petitioner." *Helton v. Secretary for the Dept. of Corrections*, 259 F.3d 1310, 1312 (11th Cir. 2001) (emphasis added, citation omitted).

"Mere excusable neglect is not sufficient." *Nara*, 264 F.3d at 319 (citations omitted).

The assertion that Petitioner could not communicate with counsel regarding his cause due to his mental incapacity is also not persuasive. Petitioner was found competent to stand trial despite the mental condition now asserted as an exceptional circumstance. It is shown that he feared for his safety enough to write a grievance in August of 1998, and appeal its denial a month later. That he perceived harassment by homosexuals and correctional officers may have been a result of delusional thinking, or it may have been grounded in fact or experience, as Petitioner argued in his grievance. Even if it was irrational or obsessive, it does not help his cause as the time had already expired by then. Further, Petitioner's Rule 3.850 motion was pending at that time, so the time (if it had not already expired) was already tolled for the period. Finally, the claims which were presented in the Rule 3.850 motion and again in this petition are claims which an attorney could glean from the record, without much assistance from Petitioner.

More important, Petitioner's thought processes at the time he wrote the grievance do not appear to have been impaired. In his hand written grievance Petitioner was able to articulate his concerns, the specific reasons for them based upon specifically described events, and was able to state the specific relief he wanted to obtain in response. That he was able to do so is consistent with conclusions reached before trial, that Petitioner understood the legal process and its consequences and could assist in his defense.

Further, with some variations, the arguments made in Petitioner's Rule 3.850 motion, with the benefit of counsel, are the same arguments raised here now by the same counsel. On November 22, 2000, the mandate on denial of the Rule 3.850 motion issued, yet there was no attempt by counsel to file the § 2254 petition until May, 2001. Counsel surely was not impeded by Petitioner's mental state if all he needed to do was to file the same arguments again in this court. This is not the kind of "diligence and alacrity" which warrants the application of equitable tolling. *Phillips v. Donnell*, 216 F.3d 508, 511 (5th Cir.), *reh'g granted in part*[5] *and otherwise denied*, 223 F.3d 797 (5th Cir. 2000) (a four month delay in receiving notice of the state court's denial of habeas corpus relief, if petitioner could establish it, would justify equitable tolling for a petitioner who had "pursued the process with diligence and alacrity" by seeking an out of time appeal in state court three days later, and filing his federal petition one month after that was denied).

Recommendation

It is therefore respectfully **RECOMMENDED** that Petitioner Dwight's 28 U.S.C. § 2254 petition, challenging his 1995 conviction out of the Second Judicial Circuit, case number 93-2413-AF, be **DENIED** as untimely.

IN CHAMBERS at Tallahassee, Florida, this 15th day of November, 2001.

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[5] Rehearing was granted only "to the extent that our reference to the defendant bearing the burden [of proof on equitable tolling] should instead place the burden on the petitioner." 223 F.3d at 797.

/s/ William C. Sherrill, Jr.
WILLIAM C. SHERRILL, JR.
UNITED STATES
MAGISTRATE JUDGE

NOTICE TO THE PARTIES

A party may file specific, written objections to the proposed findings and recommendations within 15 days after being served with a copy of this report and recommendation. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

DERRICK DWIGHT, CASE NOS. 4:01cv156-RH

Petitioner,

v.

MICHAEL MOORE,

Respondent. /

ORDER DENYING PETITION

(Filed Dec. 6, 2001)

This matter is before the court on the Magistrate Judge's Report and Recommendation (document 15) and objections thereto (document 16). I have reviewed *de novo* the issues raised by the objections. Upon consideration,

IT IS ORDERED:

The Magistrate Judge's Report and Recommendation is accepted and adopted as the opinion of the court. The clerk shall enter judgment stating, "The petition for writ of habeas corpus challenging petitioner's conviction in Case No. 93-2413-AF, Circuit Court of Leon County, Florida, is denied as untimely." The clerk shall close the file.

SO ORDERED this 6th day of December, 2001.

/s/ Robert L. Hinkle
Robert L. Hinkle
United States
District Judge

49 Fed.Appx. 288

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. The Eleventh Circuit provides by rule that unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition or motion. Eleventh Circuit rules, Rule 36-2, 28 U.S.C.A.)

United States Court of Appeals,

Eleventh Circuit.

Derrick Dwight

v.

Michael Moore*

NO. 01-17093

September 18, 2002

Appeal From: N.D.Fla., No. 01-00156-CV-4-RH

Affirmed.

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* Fed.R.App.P. 34(a); 11th Cir.R. 34-3.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-17093-EE

DERRICK DWIGHT,

Petitioner-Appellant,

versus

MICHAEL MOORE,

Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion ___, 11th Cir., 19___, ___F.2d___).

(Filed Nov. 15, 2002)

BEFORE: DUBINA, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-17093-EE

DERRICK DWIGHT,

Petitioner-Appellant,

versus

MICHAEL MOORE,

Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of Florida

(Filed Nov. 15, 2002)

BEFORE: DUBINA, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Derrick Dwight is DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE